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No.: 86-254

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

ROBERT PEMBERTON,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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STATEMENT OF THE CASE

Robert Pemberton, Respondent, was Business Manager of Local 24, International Union of Marine and Shipyard Workers of America, AFL-CIO, which represented the shipbuilder employees of the Bethlehem Steel Corporation at its Key, (named for Francis Scott Key), Highway Shipyard in Baltimore, Maryland.

Pemberton was aggressive and incurred the undying personal hatred of Milton Leubecker, Bethlehem's General Manager and his assistant, Harry O'Berry.

In 1979, Pemberton won Fifty Thousand Dollars ($50,000.00) for his members from Bethlehem in settlement of a grievance. The grievance arose out of an alleged collective bargaining contract violation by Bethlehem, for

contracting work out covered by the Agreement, to a subcontractor, M.P. Industries. Thereafter M.P.'s principals, Hamilos and Markakis, their lawyer Oppel, Leubecker and Bethlehem's personnel manager, Comer, met for the purpose of putting detectives on Pemberton to discover, "whether he had any girlfriends and where he got his money".

The obvious purpose of this enterprise was to personally destroy Pemberton.

Oppel hired Inter-State Detective Agency and Skinner, and with Comer fingering him, kept Pemberton under surveillance from November 27, 1979 to January 22, 1980. They investigated his financial affairs, used listening and detection devices on his motel

rooms and shadowed him to his girlfriend's house. (Pemberton is a married man; the statement of the Court of Special Appeals to the effect that he is divorced is mistaken).

On August 10, 1981, a typed anonymous note was sent to Mr. Pemberton's wife, informing her that Pemberton, was involved with another woman. Pemberton later learned that Bethlehem officials sent the note and a second one, similar to the first, to Respondent's wife on October 14, 1981. On January 29, 1982, a third mailing was sent to Mrs. Pemberton. This mailing contained a six page detective report detailing the surveillance instigated and carried out by Bethlehem, M.P. Industries, Comer, Opel, Inter-State, Skipper and

Luebecker and documenting the marital infidelity of the Petitioner. As a result of these mailings, Petitioner's marriage was irreparably harmed.

Two years later, (Long after the six-months Statute of Limitations for the filing of unfair labor practice charges under the National Labor Relations Act expired), [1] and after this law suit was commenced, Pemberton learned from personnel manager Comer that Bethlehem was responsible for the detective surveillance and the anonymous mailings.

The mailings resulted in the total estrangement of Pemberton's wife and complete deterioration of his home

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[1] 29 U.S.C. 160 (b)

life. This, together with realization that he had been shadowed and endangered, with no assurance that the pernicious conduct had ceased, caused chronic illness, intestinal upset, paranoia and attendant nervousness which is continuing.

Pemberton further alleges that Bethlehem was the source of repeated mailings of a thirteen year old (13) larceny conviction reproduced from court records and a "mug shot" which Bethlehem had obtained illegally. These anonymous mailings were sent once to the shop stewards and officials of Local 24 and then to the officials of other locals and to Pemberton's superiors in the International Union. Again, this resulted in emotional

distress, degradation, shame, embarrassment and humiliation.

REASONS FOR DENYING THE WRIT

1. That as the acts which invaded Respondent's privacy were done almost two years prior to the time they were discovered by the Respondent and as the National Labor Relations Act has a six month statute of limitation, it was only in the state court that the Respondent had a forum to seek redress of the wrongs which were done to him. The Court of Special Appeals of Maryland was correct in allowing the Respondent to pursue his cause of action in state court.

2. That this Court has said that there will be exceptions to pre-emption by the National Labor Relations Act where the conduct was not protected,

where there was no risk of interference with the Federal regulatory scheme, and where the state has an overriding interest in protecting individuals from certain types of conduct. Using this rationale, the Court of Special Appeals of Maryland has correctly held that Respondent's action for invasion of privacy is an exception to pre-emption by the National Labor Relations Act.

3. As the National Labor Relations Board was without power to redress the Respondent's damages for the invasion to his privacy then the concerns of the National Labor Board were distinct from those of the state court and it was only the state court that had the power to redress his grievance.

4. That even though the Respondent's cause of action for invasion to his privacy may contain elements of surveillance, which could be an "unfair labor practice" that does not necessitate pre-emption by the National Labor Relations Board and the state court was correct in holding that the Respondent's case contained elements that extended beyond an "unfair labor practice".

5. That to hold the wrongs that were done to the Respondent to be the sole concern of the National Labor Relations Board would in effect completely insulate the perpetrators from the consequences of their wrongs and therefore, the Court of Special Appeals was correct in holding that

only in the state forum would a proper remedy be possible.

6. That the conduct of the perpetrators was sufficiently outrageous so that, although it could be characterized as an "unfair labor practice" because it was conducted in a highly abusive manner, it was not pre-empted by the National Labor Relations Act.

7. That the lower courts have not allowed pre-emption where the conduct, even though it might be carried out in a labor setting, is of such a nature that no individual in a civilized society should have to endure it and therefore, the Court of Special Appeals of Maryland's decision was correct in holding that only the state

court could be the guardian of Respondent's rights in this instance.

ARGUMENT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH THE PRE-EMPTION PRINCIPLE AND THE CONTROVERSY IS NOT SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

At the outset what bars this case from pre-emption by the National Labor Relations Act is the secret nature of the surveillance of the Respondent and the anonymous mailings to Respondent's wife, which comprised the actionable conduct of the tortfeasors, but was only discovered long after the six months statute of limitations under the National Labor Relations Act had run. 29 U.S.C. 160 (b)

It would have been impossible for the Respondent to have filed an unfair labor practice for surveillance within a six month period because the use of the detectives to trial and shadow the Respondent occurred in 1979, and the Respondent did not become aware of this conduct until there was a union election in June of 1981, about two years past the time of the invasion of his privacy. It would create manifest injustice not to have permitted the Respondent to have brought his action in state court, as the first opportunity he had to file with the National Labor Relations Board would have been almost two years past the time of the acts done by the perpetrators. The state court was uniquely suited to redress these

clandestine wrongs as the National Labor Relations Act has no tolling provision for fraud and malicious conduct which was conducted in secret.

This Court has noted that this is one of the factors which should be taken into consideration when deciding whether or not pre-emption would apply. "The primary jurisidiction rationale justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so."Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 201 (1978).

The Maryland Court of Special Appeals also cited with approval the aforementioned quote from the Sears,

Roebuck & Company v. San Diego County District Council of Carpenters case. See e.g. Pemberton v. Bethlehem Steel Corporation, et al., 66 Md. App. 133, 154 (1986).

This Court has dealt with the issue of pre-emption in recent years on many occasions and Its position has been made abundantly clear as to Its holdings with regard to the issue of pre-emption by the National Labor Relations Act. "Our approach to the pre-emption issue has thus been stated and restated." Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669, 676 (1983)

However, due to the Petitioner's Petition for a Writ of Certiorari to the Court of Special Appeals of

Maryland, the Court is now faced with the pre-emption issue, again, having to decide whether or not an action for invasion of privacy, which was affirmed by the Court of Special Appeals of Maryland is pre-empted by the National Labor Relations Act. It is the Respondent's contention that the decision of the Court of Special Appeals of Maryland is not in conflict with the pre-emption principle, and that the controversy is not subject to the exclusive jurisdiction of the National Labor Relations Board.

Notwithstanding the National Labor Relations Act, This Court has held in certain circumstances that the state's right to regulate certain conduct will not be pre-empted. Pre-emption would not occur where there was no risk that

state regulation of the conduct would interfere with the regulatory scheme that Congress intended, where the conduct was not protected, and where there was an overriding state interest in protecting against the conduct of which the aggrieved party was complaining.

See, Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 298-299 (1977).

This Court has applied these principles to determine whether or not pre-emption will occur in many landmark cases. In the aforementioned, Farmer v. United Brotherhood of Carpenters, This Court permitted the Petitioner to bring an action for intentional infliction of emotional distress in a state court notwithstanding the claim

that it was pre-empted under the National Labor Relations Act. Also, as in Farmer, this Court permitted a state cause of action for defamation in Linn v. United Plan Guard Workers of America, Local 114, 383 U.S. 53 (1966) notwithstanding the claim of pre-emption because it arose in a labor relations context. In the case of Belknap, Incorporated v. Hale 463 U.S. 491 (1983), The Court said that pre-emption did not occur when replacement workers sued their employer when they were discharged after striking workers were rehired despite the assurances by their employer that the replacement workers job security in no way depended on the position of the striking workers.

It was the position of the Court that the issues of fraud and misrepresentation raised by the replacement workers in the Belknap case was separable from any concern of the National Labor Relations Board. Furthermore; it was held that only the state court had the ability to rectify the grievances associated with the fraud and misrepresentation allegations. Belknap, Inc. v. Hale, et al., 463 U.S. 491, 510 (1983). See also Sears, Roebuck and Company v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), (the Court permitted an action for trespass by an employer against union picketers).

If there is any synthesis of these cases in which there is an exception to the pre-emption by the National Labor

Relations Act, it is to the effect that intentional torts are not pre-empted because they constitute the, "so deeply rooted in local feeling", exception.

Despite this synthesis, it cannot be maintained that there is any geometrical consistency with regard to the doctrine of pre-emption as applied to the National Labor Relations Act.

> The Court, while observing that the decision in Iron Workers v. Perko, 373 U.S. 701 (1963), involved a factual situation very similar to that in this case, also recognizes that Perko's pre-emption analysis is no longer dispositive. In Perko, the mere fact that a state claim was based upon arguably prohibited conduct dictated the conclusion that the state claim was pre-empted. Id., at 708 ("It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit `arguably' comes within the Board's jurisdiction to deal with unfair labor

> practices"). This type of rigid interpretation of San Diego Building Trades Council v. Garmon 359 U.S. 236 (1959), does not survive our more recent decisions in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978); Farmer v. Carpenters, 430 U.S. 290 (1877); Linn v. Plant Guard Workers, 383 U.S. 53 (1966). As one commentator has remarked," the Garmon test can now be described only by reference to its exceptions. ...

Local 926, International Union of Operating Engineers v. Jones, supra, at 685-686 n.2 (Rehnquist, J. dissenting).

Despite this lack of geometrical consistency, this case does not present This Court an opportunity "to refine the "general" standards it has promulgated to determine when state attempts to regulate conduct "touching upon labor-management relations" will be pre-empted" Petitioner's Brief for

Certiorari at 7. The reason for this is that this case clearly falls within the exception doctrine to the pre-emption by the National Labor Relations Act that is set forth in the above cited and quoted cases.

A further test to determine whether or not there is pre-emption by the National Labor Relations Act is to ascertain whether the elements that could be presented to the National Labor Relations Board are the same as those which could be presented to the state court. If the elements are different, then pre-emption does not occur.

Sears Roebuck & Co. v. San Diego County District Council of Carpenters, supra at 197.

There is no question that the elements of this case are distinct. The National Labor Relations Board was without power to remedy the Respondent's invasion of privacy action. Although the surveillance conducted on the Respondent had some "unfair labor practice" overtones this would in no way preclude a state court from addressing the invasion of privacy aspect, and because of this, there is an element distinct from the "unfair labor practice" component. This distinct element was found by The court of Special Appeals. Pemberton v. Bethlehem Steel Corp., supra at 155 (Apx 17a)

Despite a requirement under the Perko-Jones Test that a complaint contain an element that would not be of

concern to the National Labor Relations Board in order for there to be no pre-emption, the converse of that holding, that merely because one of the distinct elements is an "unfair labor practice" also does not require pre-emption.

It is the Petitioner's contention that as certain aspects of the Respondent's invasion of privacy action could be characterized as surveillance, that this amounts in essence to an "unfair labor practice" under the National Labor Relations Act, Section 8(a) (1, 3) as amended 29 U.S.C.A. Section 158 (a) (1, 3). Though there may be some similarities between the conduct involved in an invasion of privacy under a state tort claim and an "unfair labor practice", this potential

overlap in no way, mandates that the complaint is pre-empted.

Several of This Court's decisions illustrate the fact that merely because an action may be an "unfair labor practice", does not prevent an individual from pursuing those aspects of the claim which constitute a cause of action under state law in state court. Linn, supra, (false and malicious statements), Farmer, supra (intentional infliction of emotional distress), Sears supra, (trespass), cited in Belknap, supra 509-510.

Furthermore, it should be noted that the type of surveillance in the instant case concerns prying into the most private non--work related spheres of an individual's existence. This is not the kind of surveillance that the

Act contemplates as an unfair labor practice. The case law concerning 8(a)(1, 3) reveals that the Act contemplated shadowing of individuals in their role as an employee or union representative, not following individuals into their bedrooms. See, National Labor Relations Board v. Southwire Company, 429 F.2d 1050 (5th Cir. 1970).

Another patently unfair argument, which the Petitioner uses to try to pigeon-hole its conduct into an "unfair labor practice" mold, is to assert that the Plaintiff at his deposition did not challenge the manner in which the surveillance upon him was conducted. It is unscrupulous to try to excuse the malicious conduct of the tortfeasors on the grounds that the Respondent did not

legally label the abusive manner of the conduct that was directed towards him. What is most important here is the actual conduct of the tortfeasors, and the damages of the aggrieved, not Pemberton's belief as to Bethlehem's motivation.

Strikingly similar is the case of Farmer, Special Administrator v. United Brotherhood of Carpenters and Joiners of America, Local 25, where the evidence presented focused more on the discriminatory aspects of the claim, and practically ignored the evidence which constituted the intentional infliction of emotional distress. The Court took full notice of this omission on the part of Petitioner's counsel, and the fact that he kept referring to the discriminatory aspects of the case

rather than emphasizing its tortious components.

> "Almost the entire section of Petitioner's brief summarizing the trial transcript, see Brief for Petitioner 4-10, is directed at instances of Union discrimination against Hill with respect to employment opportunities. Moreover, counsel for Petitioner, who was also Petitioner's trial counsel, indicated at oral argument that the focus of the trial was on employment discrimination rather than the intentional infliction of emotional distress: "We had to show simply two easy issues to the jury: one, what the (hiring hall) rules were; and two, were they fairly applied." Tr. of Oral Arg. 69. It is plain that those two elements are more relevant to the issue of discriminatory referrals than to issue of emotional distress."
>
> "Respondents concede that "(t)he allegations made in the Plaintiff's second cause of action...sound in

> the state tort law of intentional infliction of emotional distress," but contend that the dominant focus of the evidence adduced at trial was on discriminatory hiring hall referrals. Brief for Respondents 28"

Farmer v. United Brotherhood of Carpenters and Joiners of America, supra, at 306 n. 14.

However, notwithstanding this, This Court did not find pre-emption of the state claim, but only cautioned the trial court not to include back-pay damages for discrimination, on remand. (Here, the latter element is absent.)

Not only does the Petitioner contend that because the Respondent's invasion of privacy action may have some elements in common with an "unfair labor practice" that it is pre-empted,

it also maintains that because the tort arose in a labor-management setting, that it is pre-empted. Again, as with the "unfair labor practice" claim, This Court has held that this argument is without merit.

In all of the aforementioned cases dealing with pre-emption, whether it was for defamation, intentional infliction of emotional distress, trespass, or fraud and misrepresentation, the Court permitted the state action to proceed notwithstanding the fact that it occurred in a labor relations environment. It has been the clarion call of those who attempt to use the shield of pre-emption that whenever a cause of action arises in a labor relations setting, pre-emption should

occur, because the potential penalties, against the perpetrators for the consequences of their conduct would be diminished if not negated. As can be seen by the aforementioned cases, this is clearly not the law as set forth by This Court. See, e.g. Sears, Roebuck & Company v. San Diego County District Council of Carpenters, supra, at 196.

However, the Petitioner's most bizarre contention is that the abusive and outrageous manner in which the surveillance was committed is pre-empted. Investigating the Respondent's bank records, placing a detection device on his sleeping quarters, employing detectives to discover the intimate details of the Respondent's life, in hopes of obtaining information that would

destroy him personally and inflict mental anguish upon him, as well as injure his effectiveness as a union leader, goes far beyond the bounds of that species of "unfair labor practice" known as surveillance. The primary focus of Petitioner's wrongdoing was to break Pemberton, not the union.

To allow pre-emption in this case would be in effect using the federal law to condone behavior that should not go unregulated by the state.

> "No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by Petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct

> on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it".

Farmer v. United Brotherhood of Carpenters and Joiners of America, supra, at 302 (1977).

The Petitioner very cleverly tries to insinuate that the conduct complained of by the Respondent is merely the function of the conduct which could be called an "unfair labor practice", and hence should be pre-empted. However, there is no question that the conduct that was alleged by the Respondent was of such a nature as to be properly deemed as abusive, and because of this, pre-emption would not apply. It is just "the particularly abusive manner"

of the prohibited conduct that exempt this case from pre-emption. Farmer v. United Brotherhood of Carpenters and Joiners of America, supra, at 305.

To allow the National Labor Relations Board to have jurisdiction of this matter, would in effect be insulating the behavior of the tortfeasors. It is only the state courts that are capable of dealing with this type of conduct.

The Petitioner cites in his Petition for A Writ of Certiorari at page 9 several lower court cases where the state tort claims are "a function of the conduct which constitutes an unfair labor practice" and hence warrant pre-emption. For what purpose these cases are brought to This Court's attention is not clear for it has been

clearly shown that the conduct complained of by the Respondent is not a function of an "unfair labor practice", but the type of behavior that could only be characterized as "abusive".

Distinction of Petitioner's citations follows.

The case of Carter v. Sheet Metal Workers' International Association, 724 F.2d 1472 (11th Cir. 1984) was a claim for intentional infliction of emotional distress based upon a union's failure to issue a worker a union card to a sheet metal worker. The court decided in that case, that pre-emption by the National Labor Relations Board was applicable, because the Plaintiff only presented evidence showing the existence of discrimination and not

evidence as to the abusive manner in which it was carried out. With regard to the evidence of emotional distress, the court found no evidence of emotional distress beyond the bare statement of the plaintiff that he felt dejected, hence defendant's conduct was not, as Farmer requires, a "particularly abusive manner of discrimination". Ibid. 1476

There is no question that the conduct which was alleged and the facts presented here markedly differ from the conduct which the United States Court of Appeals for the 11th Circuit characterized in the Carter case to be a mere function of the unfair labor practice. In fact, the Court of Special Appeals of Maryland said as to the surveillance:

> "The problem is that the excerpts received by Mrs. Pemberton show a more extensive intrusion. They reveal that, on at least one occasion, a "detection device" was placed on the door of a motel room where appellant was staying and that surveillance (either on that occasion or another) was maintained from the bottom of a stairwell. The record is not entirely clear as to the nature of the "detection device", but from other statements in the excerpts, a fair inference can be drawn that it was a listening device of some sort. That kind of surveillance has been actionable."

Pemberton v. Bethlehem Steel Corp., supra, at 164-165.

Clearly, the allegations in this case make it distinguishable from the evidence presented in the Carter case.

In the case of Serrano v. Jones and Laughlin Steel Company, LTV 790 F.2d 1279 (6th Cir. 1986), the employees brought an action against their employer for fraud, negligent performance of contractual duties, and breach of a collective bargaining agreement. To avoid a shut-down, the union had entered into negotiations with the J & L Campbell Works. Certain concessions were made by the union to allow their employer to rebuild the coke batteries at the Campbell works. The employees claimed that the plant superintendent promised that if the union accepted the concessions, the plant would remain open. The plant subsequently closed and the union filed a grievance. Before taking it to binding arbitration, the union

terminated the grievance and filed an action in an Ohio Court, which was subsequently removed to the United States District Court for the Northern District of Ohio.

The principal issue on appeal to the United States Court of Appeals for the Sixth Circuit was:

> "Whether the National Labor Relations Board (NLRB or Board) has exclusive jurisdiction over a dispute between individual employees and their employer arising out of an agreement between the employer and the employees' union."

Serrano v. Jones & Laughlin Steel Co., supra, at 1281.

In answer, The United States Court of Appeals of the Sixth Circuit held:

> "Failure of an employer to bargain in good faith about terms and conditions of employment is not peripheral to the concerns of federal labor law; rather, it strikes at the heart of one of the basic concerns of that law."

Serrano v. Jones & Laughlin Steel Co., supra, at 1287.

This is in contradistinction to the instant case where the state's interest in the invasion of privacy action would be definitely peripheral to the concerns of the National Labor Relations Board.

The United States Court of Appeals for the Sixth Circuit also held that pre-emption applied because the only remedy that the employees could obtain would be for back wages and continuation of benefits. Serrano v.

Jones & Laughlin Steel Co. , supra, at 1288. (These are standard N.L.R.B. remedies).

Serrano is also inapposite to the situation presented in this case where the remedy sought is not back wages and continuation of benefits, but damages for the egregious conduct of the tortfeasors. Because it would not be within the power of the National Labor Relations Board to award compensation for these types of damages, the elements of the Respondent's claim are composed of distinct parts.

Indeed, even if redress of Bethlehem's conduct had not been time-barred under the NLRA the only remedy the Board could offer would be posting a paper notice in an empty

shipyard, under Section 8(a) (1) of the NLRA.

Finally, the Petitioner cites Lumber Production Industrial Workers Local No. 1054 v. Westcoast Industrial Relations Association, Incorporated 775 F.2d 1042 (1985). In this case, the union brought an action against two labor consultants for tortious interference with contractual relations. Among the union's allegations were that the labor consultants frustrated the union's collective bargaining objectives by encouraging employee dissatisfaction with the union, and trying to force a strike that would enable the employer to replace the existing work force and lead to possible decertification of the union. The union filed an unfair labor

practice claim with the National Labor Relations Board. The complaint was investigated and subsequently dismissed on appeal. Subsequently, the union filed an action in the state court which was later removed to the Federal District Court. As with the other aforementioned cases, the issue was whether or not:

> "The conduct alleged in the union's complaint is within the exclusive jurisdiction of the Board."

Lumber Production Industrial Workers v. West Coast Industrial Relations Association, Inc., supra, at 1045.

The United States Court of Appeals for the Ninth Circuit found that the

jurisdiction of the Federal Court was pre-empted by the National Labor Relations Board because a crucial element of the state court action was identical to the unfair labor practice covered by the National Labor Relations Act. As was shown above, the elements necessary to make out a state tort claim for invasion of privacy and the elements necessary for an unfair labor practice of surveillance in the instant case are clearly dissimilar.

The Petitioner is correct in holding that the cases of Lumber Production Industrial Workers v. Westcoast Industrial Relations Association, Incorporated, Serrano v. Jones and Laughlin Steel Company and Carter v. Sheet Metal Workers' International Ass'n show that state tort claims are

pre-empted when they are a function of the conduct which constitutes an "unfair labor practice". However, it is illogical for the Petitioner to imply that these cases are analogous to the Respondent's case. As was shown above, the egregious conduct on the part of the tortfeasors takes it out of the jurisdiction of the National Labor Relations Board because the surveillance was conducted in such a scurrilous manner.

One of the Petitioner's salient concerns as expressed in his Brief or Certiorari, is that the Court of Special Appeals of Maryland's decision allows the state to regulate behavior that is the sole province of a Federal regulatory scheme. This was posited as one of the main reasons for This Court

granting its Petition. (Petitioner's Brief, pp. 11, 12)

However, as the Respondent has conclusively shown, the conduct on the part of the perpetrators and the state's legitimate interest in regulating that conduct, creates a valid exception to the pre-emption rule as enunciated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) and its progeny.
See Farmer v. United Brotherhood of Carpenters and Joiners of America, supra at 303-305.

CONCLUSION

Because the case at bar is a valid exception to the pre-emption rule, the decision of the Court of Special Appeals of Maryland is not an impermissible regulation of conduct by

the state that was assigned by the U.S. Congress to a Federal regulatory scheme, and therefore there is no reason for the granting of the Petitioner's Writ.

The burden of proof is on the party claiming pre-emption.

> "To accept the Union's submission would be essentially equivalent to allowing a conclusory claim of pre-emption and would effectively eliminate the necessity to make out an arguable case. The better view is that those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted."

International Longshoremen's Association v. Davis, 54 U.S.L.W. 4512, 4517 (May 27, 1986).

This burden the Petitioner has failed to meet as it has not been able to show that the allegations and proof of the Respondent were merely a function of the conduct known as an "unfair labor practice" and not abusive conduct. In fact, the Petitioner is unable to demonstrate that the conduct alleged and proven by the Respondent is dissimilar from the type of conduct spoken of in the of Farmer, Special Administrator v. United Brotherhood of Carpenters and Joiners of America Local 25 characterized as:

> "Conduct on the part of union officers which is so outrageous that" no reasonable man in a civilized society should be expected to endure it."

Farmer v. United Brotherhood of Carpenters, supra, at 302.

The Respondent's state tort claim for the invasion of privacy is a function of the particularly abusive way in which the surveillance on Robert Pemberton was carried out. Because the elements constituting the state tort claim and the unfair labor practice are distinct pre-emption does not ensue. Therefore, the Writ of Certiorari of the Petitioner should not issue to review the judgment and opinion of the Court of Special Appeals of Maryland.

Respectfully submitted,

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